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Case Note

On Inuit and Judicial Protection in a Shared Legal Order

Jan H. Jans*

I. Introduction

A recent decision of the General Court of the European Union illustrates once again the limited options available to NGOs wishing to contest a decision of the European institutions before the courts.¹ In 2009, the European Union issued a regulation prohibiting the placing on the market of seal products in the European Union,² except those resulting from hunts traditionally conducted by Inuit and other indigenous communities and contributing to their subsistence. The hunt, including the hunting of seals, is an integral part of the culture and identity of the members of the Inuit society and as such is recognised by the UN Declaration on the Rights of Indigenous Peoples.³ The case concerned an application for annulment of the Regulation, brought by a number of Inuit seal hunters living in Canada and organisations representing their interests, among others.

II. Regulation 1007/2009

Seals are hunted within and outside the European Union with a view to obtaining meat, oil, blubber, organs, fur skins and other articles made from them. In the words of the Regulation's preamble, the hunting of seals has led to the expression of serious concerns by members of the public due to the pain, distress, fear and other forms of suffering which the killing and skinning of seals, as most frequently performed, cause to those animals.

In response to concerns about the animal welfare aspects of the killing and skinning of seals, several Member States had adopted or intended to adopt legislation regulating trade in seal products by prohibiting the import and production of such products, while other Member States had placed no restrictions on trade in these products. These differences in Member States' legislation were adversely affecting the operation of the internal market, and this prompted the European Union lawmaker to harmonise the rules across the EU as regards commercial activities concerning seal products, and thereby prevent the disturbance of the internal market in the products concerned. Although animal welfare concerns were the primary cause of the threatened disruption of the internal market, the Union lawmaker considered itself to have sufficient regulatory powers regarding the internal market to lay down rules on the matter.⁴

The central provision in Regulation 1007/2009 is contained in Article 3(1): "The placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence. These conditions shall apply at the time or point of import for imported products." According to the Union lawmaker, the fundamental economic and social interests of Inuit communities engaged in the hunting of seals as a means to ensure their subsistence should not be adversely affected. The hunt was explicitly recognised as an integral part of their culture and identity. Seal products resulting from hunts traditionally conducted by Inuit and other indigenous communities and contributing to their subsistence should therefore be allowed.

In order to ensure the free movement of permitted products, Article 4 of the Regulation provides: "Member States shall not impede the placing on the market of seal products which comply with this Regulation."

Despite the fact that the Regulation provides for a special position for the Inuit, they nevertheless contest it fiercely. The problem is that it is not clear in the Regulation itself what the precise scope of the exception is. What exactly should be understood by "hunts traditionally conducted by Inuit... and [contributing] to their subsistence"? Indeed, this is recognised in the Regulation itself: Article 3(4) gives the European Commission the power to adopt measures for the implementation of, *inter alia*, the prohibition in Article 3(1). In other words, it will be the Commission that lays down further rules on the conditions under which seal products that are the result of hunts traditionally conducted by Inuit and contribute to their subsistence may be placed on the market. This prompted Duane Smith, the president of Inuit Circumpolar Conference Canada, a Canadian organisation representing and promoting the interests of Inuit communities in the EU, to call on the EU "to come clean on what they mean by the so-called Inuit exemption, because, "until now the EU has demonstrated more interest in keeping non-Inuit out of the

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¹ Case T-18/10 *Inuit Tapiriit Kanatami and Others v EP and Council*, Order of 6 September 2011.

² Regulation 1007/2009 on trade in seal products, OJ EU 2009 L 286/36.

³ Cf. Art. 20(1) Declaration: "Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities".

⁴ See on the powers of the EU regarding animal welfare: J.H. Jans & H.H.B. Vedder, *European Environmental Law, After Lisbon*, 4th edition 2012, pp. 11 and 32-33.

Case Note

market than finding ways of including Inuit. As such, it is hard to support such an unclear, flawed, and unfair regulation. They left us with no alternative but to sue”.⁵ Raymond Ningeocheak, Vice-President of Finance for Nunavut Tunngavik Inc.,⁶ added: “the exemption in the Regulation is uncertain and was adopted without the participation of Inuit, and the EU is proceeding with implementing measures, also without the participation of Inuit”.⁷

Sufficient reason, therefore, to take legal action against the Regulation. On 11 January 2010, a large number of hunters and organisations promoting their interests filed a lawsuit in the European General Court seeking its annulment.

III. The Basis for the Action for Annulment in the Treaty on the Functioning of the European Union (TFEU)

I have already on several occasions and in other publications raised the issue of the problematic position of third parties, particularly “general interest organisations”, seeking judicial protection.⁸ Put briefly, the problem is the following. For an action brought by a third party seeking the annulment of an act of a European institution to be admissible the act must be of “direct and individual concern” to the applicant. Particularly the requirement that the act be of “individual concern” proves in practice to be a hurdle that is virtually insurmountable. According to settled case law, persons are only considered to be individually concerned “if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed”. In the literature this is referred to as the *Plaumann* test.⁹

However, with the entry into force of the Lisbon Treaty, the situation has changed somewhat. The real culprit, the text of former Article 230(4) EU Treaty and its interpretation by the Court of Justice, has been amended by the Lisbon Treaty. The text (now Article 263(4) TFEU) currently states: “Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, *and against a regulatory act which is of direct concern to them and does not entail implementing measures.*”

The changes introduced by Lisbon are marked in italics. Briefly, this means that the requirement of “individual concern” no longer applies, as long as the action is against “a regulatory act which is of direct concern to them and does not entail implementing measures.” The problem, however, is that the term

“regulatory act” is defined nowhere in the Treaties. It is therefore not surprising that there has been discussion in the literature on the interpretation of the term. Incidentally, its interpretation is hardly relevant in relation to directives as they, by definition, require national implementing measures and can thus never directly affect an individual. However, as regards regulations, and in this case Regulation 1007/2009, the question may be raised whether the term “regulatory acts” covers only “delegated” (Art. 290 TFEU) and “implementing” measures, or whether it also includes regulations that were made according to a legislative procedure and are referred to as “legislative acts” by the Treaty (Arts. 289 and 290 TFEU). Basically, these are procedural law acts; since Lisbon, the terms “delegated acts” and “implementing acts” (cf. Art. 290 TFEU) have been used to refer to substantive secondary European law.

Some scholars, including Barents, do not regard “legislative acts” as “regulatory acts” within the meaning of Art. 263(4) TFEU.¹⁰ Others are less purist and argue, partly in view of the right of access to justice granted by Article 47 of the European Charter of Fundamental Rights,¹¹ in favour of a broader interpretation of the term so that it would, in principle, cover all regulations.

In Case T-18/10, the General Court sided with the purists. Applying a primarily systematic interpretation, it arrived at the conclusion that the term “regulatory act” does not cover all acts of general application. In particular, the term “regulatory act” must be contrasted with the new term “legislative act”. The Court then concluded that the term “regulatory act” must be understood as covering “all acts of general application apart from legislative acts.” In order to challenge these acts before the Court, it is therefore no longer necessary for persons to show that an act is of individual concern to them, provided it does not entail implementing measures.

In this case the Court had little difficulty categorising Regulation 1007/2009 as a legislative act and not a regulatory act. The Regulation was adopted using the

⁵ See press release at: <http://www.itk.ca/media-release/inuit-sue-european-union-eu-overturn-seal-product-import-ban-defending-inuit-rights-an>.

⁶ See: <http://www.tunngavik.com/about>.

⁷ Cf. on this Art. 18 of the Declaration referred to in note 3: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions”.

⁸ Cf. J.H. Jans & H.H.B. Vedder, *European Environmental Law, After Lisbon*, 4th edition 2012, Chapter 5, section 5.1.

⁹ Case 25/62 *Plaumann v Commission* [1963] ECR 95.

¹⁰ Cf. R. Barents, *Het Verdrag van Lissabon. Achtergronden en commentaar*, 2008, p. 508.

¹¹ OJ EU 2010 C 83/2.

Case Note

co-decision procedure, since the Lisbon Treaty “the ordinary legislative procedure” (Art. 294 TFEU). According to the Court, categorisation of the regulation depends on the procedure followed, not its general nature. In this sense, the term “procedural law”, mentioned above, is certainly applicable.

Once the Regulation had been categorised as a legislative rather than a regulatory act, this meant that the admissibility of parties to the action had to be judged in accordance with the older rules requiring “direct and individual concern”. The central element in the Regulation is that only seal products resulting from hunts traditionally conducted by Inuit and other indigenous communities and contributing to their subsistence may be placed on the market (Art. 3 of the Regulation). In this light, it is hardly surprising¹² that the General Court only considered the Regulation to be of direct concern to those persons that are active on the European market. The Regulation may directly affect the factual situation of other parties (the hunters and organisations representing their interests), but not their legal situation. Not, it should be added, that direct concern would have helped these parties: without blinking an eyelid, the Court applied the settled case law regarding “individual concern” from the *Plaumann* test, with the inevitable result that the action was declared inadmissible.

IV. The Private Interest Bias in EU Administrative Procedural Law

The question that may be raised is: What now? What other options are available to the interested parties in this case? As I have already indicated above, the Commission will in due course take further measures for the implementation of Article 3(1) regarding what exactly must be understood by “other indigenous communities” and “hunts traditionally conducted”. It seems to me that such measures could certainly be regarded as regulatory acts. It would then no longer be possible to dismiss an action against those further measures by exporters of sealskins and other traders active on the European market for want of “individual concern”. And, it seems to me, as the requirement of “direct concern” would also be met in this case, nothing else ought to stand in the way of an admissible action. Unless the second condition of Article 263(4) was not fulfilled, namely that the regulatory act “does not entail implementing measures”. Here, this was not an issue the General Court had to rule on, as the Regulation could not be regarded as a regulatory act.¹³ It is important to note that most regulations are implemented in Member States when the competent national authorities apply the harmonised European rules in a specific case. The same will apply here: the competent national customs authorities will have to refuse the import of products that do not fulfil the

conditions laid down by the Regulation. If the refusal were then regarded as an implementing measure, the practical impact of the widening of the right to appeal would in fact be very limited. If that were the interpretation given, an interested party would still have to appeal the individual decision before the national courts arguing that the European regulation was invalid (see Art. 277 TFEU), and the national court would then first have to request the Court of Justice for a preliminary ruling on validity. However, for the present purpose I shall assume that an individual decision of a national authority in implementation of the European rule could not be regarded as an implementing measure within the meaning of Article 263 TFEU, and that an action brought by persons trading seal products on the European market would be admissible in an action against the further measures taken by the Commission to implement Article 3 of the Regulation.

Little will change for the hunters and the organisations protecting their interests. It may be assumed that the Court will conclude that although those further implementing measures do affect the *factual* position of the hunters, they cannot be said to affect their *legal* position. In all probability the action will again be ruled inadmissible. Elsewhere, I have argued that European administrative procedural law is “private interest biased”.¹⁴ It is not sufficient to guarantee judicial protection in policy areas where *general* interests are at stake, as for example is the case concerning the protection of the cultural identity of minority groups. Active market participants will get their day in court, but the hunter whose traditional way of life is threatened faces a closed door.

Are the hunters out of options, then? With a little goodwill, Regulation 1007/2009 could be regarded as environmental law within the meaning of Regulation 1367/2006 on the application of the provisions of the Aarhus Convention.¹⁵ This Regulation defines “environmental law” as “Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving,

¹² See also Case C-362/06 P *Sahlstedt v Commission* [2009] ECR I-2903.

¹³ Meanwhile, the General Court has given some consideration to this issue, Case T-262/10 *Microban v Commission*, Judgment of 25 October 2011 and more recently Case T-381/11 *Eurofer v Commission*, Judgment of 4 June 2012.

¹⁴ J.H. Jans & H.H.B. Vedder, *European Environmental Law, After Lisbon*, 4th edition 2012, p. 241.

¹⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ EU 2006 L 264/13.

Case Note

protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems". This would seem a viable argument, given the references to "the sustainable management of marine resources" in both the preamble and text of Regulation 1007/2009. Article 10 of Regulation 1367/2006 creates an "internal review procedure": "Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act". The reason this internal review procedure was created was the lamentable position of environmental organisations under Article 263(4) TFEU. However, access to the review procedure is confined to "administrative acts", in the Regulation defined as "any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects". Research into the initial application of the review procedure has shown that European institutions interpret the term "administrative act", and particularly the element "individual scope", extremely restrictively.¹⁶ Consequently, hardly any applications have successfully overcome the admissibility hurdle. In the light of this research, it has been argued that access to the review procedure should be widened, particularly in view of the new Article 263(4) TFEU, in such a way that acts of general application, not being legislative acts, should also fall within the scope of application of the Regulation. The basis for this argument, we felt, was to be found in the Aarhus Convention. Article 1 of Regulation 1367/2006 states its object to be "to contribute to the implementation of the obligations arising under [...] the Aarhus Convention]". From Article 2(2) of the Convention, it is clear that the Convention does not apply to public authorities acting in a legislative capacity. The explanation for this exception can be found in the Aarhus Convention Implementation Guide, which states: "This is due to the fundamentally different character of decision-making [...] in a legislative capacity, where elected representatives are more

directly accountable to the public through the election process [...]".¹⁷ From this we deduce that not every act of general application is excluded from the scope of the Aarhus Convention, but only where it is legislation in the true sense of the word. For this reason, the authors argue in favour of interpreting the term "individual scope" in Regulation 1367/2006 so as to be consistent with the Convention,¹⁸ and thus confined to true "legislative acts". This would create the possibility of making further implementing measures by the Commission under Article 3 of Regulation 1007/2009 subject to internal review under Regulation 1367/2006. In my view, the decision of the General Court in Case T-18/10 offers interesting perspectives, particularly as a result of the distinction made between "legislative acts" and "regulatory acts". In a most recent case the General Court seems to have followed a similar line of thought.¹⁹ It ruled that Article 10(1) of Regulation 1367/2006 – which limits access to the internal review procedure to "measure[s] of individual scope" – is incompatible with the Aarhus Convention.

The problem remains that the review procedure is available only to non-governmental organisations whose primary stated objective is to promote environmental protection (Art. 11 Regulation 1367/2006). Individual Inuit hunters and organisations aiming to protect the interests of Inuit in general would still be excluded, even under this procedure. Nevertheless, the decision does offer interesting perspectives for "genuine" environmental organisations.

¹⁶ J.H. Jans & G.J. Harryvan, "Internal Review of EU Environmental Measures. It's True: Baron Van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation", [2010] *Review of European and Administrative Law*, Vol. 3, No. 2, pp. 53-65.

¹⁷ To be found at: <http://www.unece.org/env/pp/acig.pdf>. This document does not, though, have any particular legal status.

¹⁸ See for the obligation under Union law to interpret in a way which is consistent with the Aarhus Convention Case C-240/09 *Lesoochránárske zoskupenie*, Judgment of 8 March 2011.

¹⁹ General Court Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission*, Judgment of 14 June 2012. See also, on the same day, Case T-396/09 *Vereniging voor Milieudéfensie v Commission*.